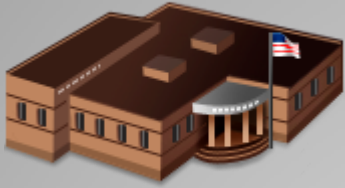


# **UFOMA CONFERENCE RUBY'S INN**

Carol B. Lear  
Utah State Office of Education  
Monday, October 3, 2011



**Should local board  
members bid on school  
construction projects  
for their own school  
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Can the district buy the lighting equipment  
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**DEMANDING** to see all winning  
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# STATE LAWS:



- **63G-6-1001. Felony to accept emolument.**

Any person acting as a procurement officer for the state of Utah or any subdivision thereof, or who in any official capacity participates in the procurement of any supplies, services, construction, real property, or insurance for any such political units, is guilty of a felony if the person asks, receives, or offers to receive any emolument, gratuity, contribution, loan, or reward, or any promise thereof, either for the person's own use or the use or benefit of any other person or organization from any person interested in the sale of such supplies, services, construction, real property, or insurance.



- **Section 67-16 Public Officers and Employees Ethics Act**
- **67-16-4. Improperly disclosing or using private, controlled, or protected information -- Using position to secure privileges or exemptions -- Accepting employment which would impair independence of judgment or ethical performance -- Exceptions.**

(1) Except as provided in Subsection (3), it is an offense for a public officer, public employee, or legislator, under circumstances not amounting to a violation of Section 1. 63G-6-1001 or 76-8-105, to:

(a) accept employment or engage in any business or professional activity that he might reasonably expect would require or induce him to improperly disclose controlled information that he has gained by reason of his official position;

**(b) disclose or improperly use controlled, private, or protected information acquired by reason of his official position or in the course of official duties in order to further substantially the officer's or employee's personal economic interest or to secure special privileges or exemptions for himself or others;**



- **67-16-4. (Cont.)**

**(c) use or attempt to use his official position to:**

**(i) further substantially the officer's or employee's personal economic interest; or**

**(ii) secure special privileges or exemptions for himself or others;**

(d) accept other employment that he might expect would impair his independence of judgment in the performance of his public duties; or

(e) accept other employment that he might expect would interfere with the ethical performance of his public duties.

- **53A-20-101. Construction and alteration of schools and plants -- Advertising for bids -- Payment and performance bonds -- Contracts -- Bidding limitations on local school boards -- Interest of local school board members.**

As used in this section, the word "sealed" does not preclude acceptance of electronically sealed and submitted bids or proposals in addition to bids or proposals manually sealed and submitted.

(2) (a) Prior to the construction of any school or the alteration of any existing school plant, if the total estimated accumulative building project cost exceeds \$80,000, a local school board shall advertise for bids on the project at least 10 days before the bid due date.



(b) The board shall have the advertisement published in a newspaper having general circulation throughout the state and in appropriate construction trade publications that offer free listings.

(c) A similar advertisement is required in a newspaper published or having general circulation in any city or county that would be affected by the proposed project.

- **53A-20-101. (Cont.)**

(d) The advertisement shall:

- (i) require sealed proposals for the building project in accordance with plans and specifications furnished by the local school board;
- (ii) state where and when the proposals will be opened and shall reserve the right of the board to reject any and all proposals; and
- (iii) require a certified check or bid bond of not less than 5% of the bid to accompany the bid.

(3) (a) The board shall meet at the time and place specified in the advertisement and publicly open and read all received proposals.

**(b) If satisfactory bids are received, the board shall award the contract to the lowest responsible bidder.**

(c) If none of the proposals are satisfactory, all shall be rejected.

(d) The board shall again advertise in the manner provided in this section.

(e) If, after advertising a second time no satisfactory bid is received, the board may proceed under its own direction with the required project.

- **53A-20-101. (Cont.)**

(4) (a) The check or bond required under Subsection (2)(d) shall be drawn in favor of the local school board.

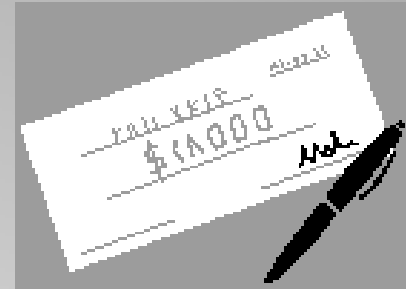
(b) If the successful bidder fails or refuses to enter into the contract and furnish the additional bonds required under this section, then the bidder's check or bond is forfeited to the district.

(5) A local school board shall require payment and performance bonds of the successful bidder as required in Section 1. 63G-6-505.

(6) (a) A local school board may require in the proposed contract that at least 10% of the contract price be withheld until the project is completed and accepted by the board.

(b) If money is withheld, the board shall place it in an interest bearing account, and the interest accrues for the benefit of the contractor and subcontractors.

(c) This money shall be paid upon completion of the project and acceptance by the board.



- **53A-20-101. (Cont.)**

(7) (a) A local school board may not bid on projects within the district if the total accumulative estimated cost exceeds \$80,000.

(b) The board may use its resources if no satisfactory bids are received under this section.

(8) If the local school board determines in accordance with Section 63G-6-501 to use a construction manager/general contractor as its method of construction contracting management on projects where the total estimated accumulative cost exceeds \$80,000, it shall select the construction manager/general contractor using one of the source selection methods provided for in Sections 63G-6-401 through 63G-6-501.

**(9) A local school board member may not have a direct or indirect financial interest in the construction project contract.**



- **63G-6-105. Exemptions from chapter – Compliance with federal law.**

(3) This chapter shall not prevent the state or a local public procurement unit from complying with the terms and conditions of any grant, gift, or bequest that is otherwise consistent with law.

- **63G-6-103. Definitions.**

(4) (a) "Construction" means the process of building, renovation, alteration, improvement, or repair of any public building or public work.

(b) "Construction" does not mean the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property.

- **63G-6-104. Application of chapter.**

(4) Unless otherwise provided by statute, this chapter does not apply to procurement of real property.

- **53A-3-405. Approval of purchases or indebtedness -- Board approval of identified purchases.**

(1) An officer or employee of a school district may not make a purchase or incur indebtedness on behalf of the district without the approval and order of the board.

(2) The board shall adopt one of the following approval methods, or a combination of the two:

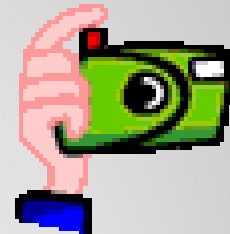
(a) The board shall approve an appropriation for identified purchases in the district budget. Each purchase made under an identified purchase does not require additional board approval.

(b) The board shall approve individual purchases when made throughout the fiscal year.

**GOVERNMENT RECORDS  
(GRAMA)  
Title 63G, Chapter 2**



- **DEFINITION of RECORD: Section 63G-2-103(22)**
  - book, letter, document, paper, map, plan, photograph, film, card, tape, recording, electronic data, or other documentary material regardless of physical form or characteristics
  - NOT: personal notes or communications, daily calendar or notes for private use received in the public employee's private capacity, drafts for individual or internal use, public employees' privately owned books or material; things that are not reduced to record form such as mental impressions, conversations that are not recorded, opinions, etc.



- **Section 63G-2 GOVERNMENT RECORDS AND MANAGEMENT ACT**

(2) The following records are public except to the extent they contain information expressly permitted to be treated confidentially under the provisions of Subsections 1. 63G-2-201(3)(b) and (6)(a):

(e) information contained in or compiled from a transcript, minutes, or report of the open portions of a meeting of a governmental entity as provided by Title 52, Chapter 4, Open and Public Meetings Act, including the records of all votes of each member of the governmental entity;

- **Section 63G-2 GOVERNMENT RECORDS AND MANAGEMENT ACT (Cont.)**

(3) The following records are normally public, but to the extent that a record is expressly exempt from disclosure, access may be restricted under Subsection 1. 63G-2-201(3)(b), Section 63G-2-302, 63G-2-304, or 63G-2-305:

(a) administrative staff manuals, instructions to staff, and statements of policy;

**(b) records documenting a contractor's or private provider's compliance with the terms of a contract with a governmental entity;**

**(c) records documenting the services provided by a contractor or a private provider to the extent the records would be public if prepared by the governmental entity;**

- **Section 63G-2 GOVERNMENT RECORDS AND MANAGEMENT ACT (Cont.)**

**(d) contracts entered into by a governmental entity;**

**(e) any account, voucher, or contract that deals with the receipt or expenditure of funds by a governmental entity;**

(f) records relating to government assistance or incentives publicly disclosed, contracted for, or given by a governmental entity, encouraging a person to expand or relocate a business in Utah, except as provided in Subsection 1. 63G-2-305(35);

- **FEES: Section 63G-2-203**

- Governmental entity may charge a reasonable fee to cover the entity's ACTUAL COST of providing a record. Fees must be approved by the governmental entity's executive officer (local board or superintendent)
- hourly charge must not exceed the salary of the lowest paid appropriate employee
- Political subdivisions (school districts/charter schools) shall establish fees by ordinance or written formal policy adopted by the governing body

- **REQUESTS AND RESPONSES: Section 63G-2-204 (1) and (5)**
  - Request must provide name, mailing address and daytime phone, identify requested information with “reasonable specificity”
  - Usually within 10 days
  - Requester can ask for “expedited response”—usually the media (benefits the public rather than the person)
  - Government entity can have more time for “extraordinary circumstances” –another entity has the records, request is for a “voluminous quantity of records,” requester seeks “substantial number” of records in a short time period, gov’t entity has a large number of record requests, request requires legal review, segregating requested information from confidential information will take time and editing, etc.

# POINTS TO REMEMBER

- 1. If you are a school district or charter school procurement specialist or officer or Business Administrator or local superintendent or assistant superintendent (obviously)—you are a public employee. The rules and ethical standards apply to YOU.
- 2. You may also be a licensed Utah educator. Specific professional educator standards also apply to you.
- 3. When buying, selling, procuring goods or services for your employer, you should follow state law, Utah State Board of Education Rules, school policies, and involve the local board in the decision-making.

## Cont.

- 4. Consider the public PERCEPTION of your actions, as well as technical and legal compliance.
- 5. When making decisions, take the time you need and consult appropriate experts.



# SCENARIOS

**(1)** The Business Administrator at Sunnyville School District is responsible for selecting the insurance package for employees and presenting the recommendation to the local board of education for approval. National Insurance Company calls BA regularly, invites her to play golf, go to lunch, attend a company picnic for the purpose of giving her a comprehensive understanding of the insurance package and the personal service that the company will provide to District employees. **Is it appropriate for BA to accept invitations? What could she do instead?**



**(2)** Large School District has a procurement officer. This person's job description is to oversee the process of buying and selling school district property and equipment, from lawn maintenance equipment for the athletic fields to small parcels of excess real property that the district wants to acquire or finds it no longer needs—because the LDS seminary WON'T be built across the street from the new high school after all!

Procurement Officer receives phone calls occasionally from interested buyers of real property or someone seeking to sell school district a “great package” of lawn maintenance equipment, once owned by the BYU, but the school is selling its expensive football stadium maintenance equipment. Callers ask about the procurement process; how often does the district buy new equipment? Will such-and-such parcel be available for sale anytime soon? Can you let me know when/if such-and-such parcel will be available for sale? **Is there a problem with sellers or prospective buyers calling and asking questions or sending similar questions via email?**

## (2) Cont.

One caller asks Procurement Officer to meet him at a local café before bids are due for a specific project. **Any problems with this type of question-and-answer discussion?**

The superintendent and/or Business Administrator (who is also the district personnel and special education director) at Small School District are responsible for the bidding process for a remodel for one of two middle schools in the school district. Superintendent and BA golf regularly with a local builder who has expressed interest around the community in bidding on the middle school remodel. These individuals in this small community are friends and regularly socialize together. **Any problems with their regular golf games? What could all involve do to maintain their impartiality and the fairness of the process?**



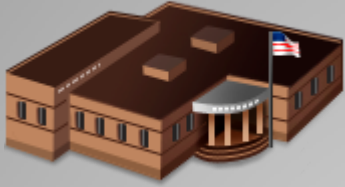
**(3)** Several district employees (in a larger district) are responsible for selecting architects and sub-contractors for smaller district projects. At some appropriate level, the employees make recommendations to the local school board for approval of purchases or the projects. The same architects and contractors, perhaps because they live in the school community, buy tables at the school district fundraiser or sponsor a booth at the school district carnival.

- **Any problem with the vendors buying a table or sponsoring a booth at the district fundraiser?**
- **What if vendors EXPECT school employees with responsibility for making construction decisions to sit WITH them at the tables they buy or WORK along side them at the booths they sponsor? Any problem with this?**

**(4)** A local board member from Rural/Small School District owns a plumbing business. Local board/superintendent determines to make minor school repairs, including plumbing repairs to two schools. School district/local board determines to “bid” on the project—essentially internally financing the repairs. School board member would like to provide plumbing work “at a really good price” for the work.

- **Would this be legal? [see §53a-20-101(9)]**
- **What if the board member offers to do the work in the name of his company (Board Member and Sons), instead of privately?**





**Should local board members bid on school construction projects for their own school districts?**

No. If for no other reason, Utah law §20A-14-203 forbids school board members from being "employees" of the board. How broad is "employee?"

**DO WE ALWAYS HAVE TO TAKE THE LOWEST BIDDER ON A PROJECT?**

The state Procurement Code says "lowest **responsible** bid."

A BA's brother-in-law will give the district a good deal on lighting for our new school? Can the district buy the lighting equipment from his company? If there is a strict bid or proposal process; pretty hard to avoid a perceived "inside deal."

**Should I have luncheon meetings with vendors? I buy lunch!**

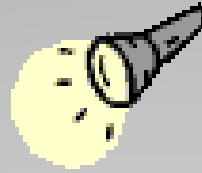
If you have no part in the bid selection or procurement process OR if you take nothing of value from the vendor (at the lunch date—see §63G-6-1001), having lunch is no problem. Remember the appearance of the lunch date.

**Does my small school district staff have to respond to letters DEMANDING to see all winning bids for a school plumbing project?**

Yes. But you can use one of the exceptions under GRAMA to give you additional response time AND you can charge the requester for “actual time” that it takes to respond.







**Can I take that really useful small  
flashlight that WeLoveU Insurance  
offers at the UFOMA Conference?  
What about the Tootsie Roll?  
It is up to you. Be aware you are  
taking an "emolument."**

**Can I tell my brother about  
property the school district expects  
to put on the market?  
If the information has not been released  
publicly, NO.**

**What does it mean to "secure  
special privileges" for  
herself, if she is an elected  
public official?**

**To reveal when a job will be available, to  
discuss the *real* job qualifications, to  
borrow the district van for the weekend,  
to expect access to student records to  
learn more about her son's friends, etc.**

**DOES THE PUBLIC OFFICERS AND EMPLOYEES' ETHICS ACT APPLY TO ONLY TO SCHOOL BOARD MEMBERS OR ALSO TO SCHOOL DISTRICT EMPLOYEES?**

**It is the Public Employees and Officers Ethics Act.**



When can I refuse to give documents or information to an angry community member who is calling and harassing my staff every day for "evidence?"

An agency can refuse if there is no "record" for the requester to receive, if the information is designated "private" or "protected" under the law, if the requester refuses to pay legitimate fees, if you are within the designated time period to produce records, etc. The response should come from the Agency or LEA Records Officer.